(1)

Supreme Court, U.S.
FILED

01 625 OCT - 9 2001

OFFICE OF THE CLERK

No.

SUPREME COURT OF THE UNITED STATES

October Term, 2001

CLIFFORD J. JOHNSON, Petitioner

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

Clifford Johnson
P. O. Box 1128
Gualala, CA 95445-1128
Tel: (707) 884-4066

Petitioner pro se.

69pp

QUESTIONS PRESENTED

If, to enforce a private contract, a (state) court issues an order that operates to deter the filing of prospective claims under the False Claims Act, without the government having been informed, is the order void as against public policy?

If, to enforce a private contract, a (state) court issues an order that operates to deter the reporting of *any* information that might be of interest to federal regulatory agencies, is the order void as against public policy?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings herein, and in the state courts, are: petitioner, Clifford Johnson; principal respondent the Board of Trustees of Leland Stanford Junior University; and respondents Cedric Bennett, John Sack, and Robert Street.

TABLE OF CONTENTS

Jurisdiction 1

Constitution And Statutes 2

Statement Of The Case 2

1. Introduction 2

2. The Questions Arise As Narrow Matters Of Law, Because Petitioner Accepts The Findings Of Fact 4

3. The Settlement Negotiations And Rescission 7

4. The Excerpted Record On Which Stands The Decision Of The Court Of Appeal. 11

   A. Opening Brief, Statement of Facts: Re FCA Claims 11

   B. Opening Brief, Point 5: "The Judgment Is Against Public Policy Because It Impairs The Capacities Of The United States And Appellant To Utilize The FCA, [And] Invades Appellant's First Amendment Rights Re A Matter Of Public Concern." 13

   C. Opposition Brief: The FCA Issue Was From The Outset Mooted By Limitations; Unwaivable Claims Are Not Waived. 18

D. Reply Brief: "Respondents Conceal Their Expectation That FCA Limitations Would Expire In 2000" 20

E. Petition For Rehearing: "Legality Of Judgment" 21

F. Opposition To Rehearing 23

G. Questions Presented To The Supreme Court... 24

Reasons For Granting The Writ 24

1. The Questions Are Simply And Surely Raised..... 24

2. Whether Courts Can Enforce Terms That Deter *Any* Communication Of Possible Interest To Regulatory Agencies Is An Unsettled Question Of Importance, Which The State Has Decided Contrary To Applicable Federal Law..... 25

3. Whether Courts Can Enforce Terms That Generally Deter The Filing Of FCA Claims, Without The Government Being Informed, Is An Unsettled Question Of Importance, Which The State Has Decided Counter To Applicable Federal Law..... 27

Conclusion 29

Appendix 1: Oral Order Granting Judgment.....30

Appendix 2: Confidential Judgment (Redacted) 32

Appendix 3: Order Denying New Trial 36

Appendix 4: Court Of Appeal Decision 37

Appendix 5: Denial of Petition for Rehearing.....55

Appendix 6: Order Of Supreme Court.....56

Appendix 7: Involved FCA Provisions 57

PROOF OF SERVICE 62

Table Of Authorities.....vi

TABLE OF AUTHORITIES

Cases

California Teachers Assn. v. State Of California (1999) 20 Cal.4th 32717
Cariveau v. Halferty (2000) 83 Cal.App.4th 128 25
City of Glendale v. George (1989) 208 Cal.App.3d 1394 7
Cox Broadcasting Corporation v. Cohn (1975) 420 U.S. 469 19
Digital Equipment Corp. v. Desktop Direct (1994) 511 U.S. 863 28
EEOC v. Astra USA, Inc. (1996) 94 F.3d 738 29
Fallout v. Hampshire (1999) 74 Cal.App.4th 1394, 1400 7
Gilbert v. National Enquirer, Inc. (1996) 43 C.A.4th 1135 19
Holmes v. General Dynamics Corp. (1993) 17 Cal.App.4th 1418 12
Linsley v. Twentieth Century Fox Films Corp. (1999) 75 Cal.App.4th 762 17
Murdock v. Pennsylvania (1943) 319 U.S. 105 16
Nguyen v. City of Cleveland (2000) 121 F.Supp.2d 643 31
Organization For A Better Austin v. Keefe (1971) 402 U.S. 415 19
Reno v. American Civil Liberties Union (1997) 117 S.Ct. 2329 16
San Jose Mercury News v. U.S. Dist. Court (1999) 187 F.3d 1096 20
Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal.3d 501 16
TS Infosystems, Inc. v. U.S. (1996) 36 Fed.Cl. 570 22
U.S. ex rel. DeCarlo v. Kiewit. (1996) 937 F.Supp. 1039 19
U.S. ex rel. Green v. Northrop Corp. (1995) 59 F.3d 953 ..... 24, 31
U.S. ex rel. Hall v. Telydyne Wah Chang Albany (1997) 104 F.3d 230 31
U.S. ex rel. Killingsworth v. Northop Corp. (1994) 25 F.3d 715 ..... 15, 19, 25
U.S. ex rel. McCoy v. California Medical Review (1990) 133 F.R.D. 143 18
United States v. Mezzanato (1995) 513 U.S. 196 32
Wilson v. Superior Court (1975) 13 Cal.3d 652 19
Wise v. Thrifty Payless, Inc. (2000) 83 Cal.App.4th 1296 24

Statutes

California Code of Civil Procedure, section 664.6 .....5, 26
California Code of Civil Procedure section 656 39
California Labor Code section 1102.5 24
United States Code title 10 section 2306a.....3, 11
United States Code title 10 section 2324(c).....11
United States Code title 18 section 1001 .....12, 22
United States Code title 28 section 1257 1
United States Code title 28 section 2101 1
United States Code title 31 section 3729 *et seq.* .....passim

Constitutional Provisions

California Constitution, article I section 2 19
United States Constitution, First Amndment.....passim

Rules

Supreme Court Rules, Rule 13.3.....1

Regulations

Code of Federal Regulations title 48 Chapter 1 subpart 31.3.....4, 11

Other References

The Recorder (San Francisco), Sept. 18, 2001.....29
The Recorder (San Francisco), Sept. 19, 2001.....30
H. Rep. No. 33, 102nd Cong., 1st Sess.,.....3

JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), petitioner Johnson seeks a writ of certiorari to review the decision of the Court of Appeal for the State of California, Sixth Appellate District, filed April 20, 2001 (No. HO20137). Appendix 4, pp.37-54.

Petitioner contends that, because it issued without the federal government having been informed, and affirms a judgment that threatens substantial penalties should he so act, the decision violates public policy, and so impermissibly invades his rights:

(1) to file claims under the FCA; and

(2) to tell the government what sum Stanford agreed to pay him to settle a state suit and promise not to file prospective claims under the FCA.

The court of appeal denied a Petition for Rehearing by order filed May 24, 2001. P.55. The Supreme Court of the State of California denied a discretionary Petition For Review by order filed July 11, 2001. P.56.

The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules, Rule 13.3.

CONSTITUTION AND STATUTES

This petition involves the rights of the United States and of petitioner to utilize the provisions of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* Relevant parts of the FCA are set forth at pp.57-61.

The petition also involves the First Amendment's prohibition against "abridging the freedom of speech, or of the press," to the extent that it contributes to the public policy that protects communications to regulators.

STATEMENT OF THE CASE

1. Introduction

Petitioner Johnson filed suit against respondents in 1994, alleging state tort and contract claims arising from the allegedly pretextual termination of his employment by Stanford University, after eleven years employment in the Stanford Data Center, an administrative unit. The individual respondents comprise his line managers.

Stanford, a private educational institution, receives hundreds of millions of dollars each year from the Department of Defense, in research grants that include payments for administrative overheads. Petitioner's functions included measuring, for billing, planning, and performance purposes, the utilization of Stanford's most expensive administrative resource, mainframe computers. His responsibilities included calibrating an "accounting

factor," applied to all charge-outs. Besides supporting Stanford's administrative information systems, these computers were used by every kind of organization associated with the University. As a result, a multi-million dollar annual volume of diversely charged back federal claims rested on petitioner's measurements.

In a struck pleading (p.11 n.7), petitioner obliquely alleged several regulatory violations, which he plainly could repackage as FCA claims. In attacking the judgment, this is the example he has regularly used to concretize the FCA claims issue.[1] Its merits were never reached:

> Said doubling of mainframe computing required the prompt unforeseen expenditure of funds in excess of a million dollars, and foreordained an unforeseen ongoing operating cost increase assessed in seven-figures per year, wherefore disclosure was mandated under 10 U.S.C. § 2036a(e)(1). Further, said doubling was largely due to one of a group of highly visible "CORE" accounts billed already politically low and

---

[1] Supporting allegations included that, in 1991, after an agency investigation and two days of hearings, a congressional committee found that pervasive defects in Stanford's accounting systems had for years generated and obscured excessive, ballooning, and misallocated indirect cost claims, including one claim for the cost of mainframe computing. H. Rep. No. 33, 102nd Cong., 1st Sess., p. 68. In the same month that he learned of the decision to lay him off (April 1992), petitioner was contacted by government auditors researching this detail.

virtually fixed rates, notwithstanding fundamental federal regulations broadly prohibiting rate differences. Said doubling exploded this defect to the point at which some 90% of the mainframe services...were consumed by a group of accounts that was charged only some 10% of the Data Center's budget. By enormously stretching the differences in rates charged to various accounts, non-disclosure of the unforeseen doubling implicates an ongoing and unauthorized diversion of funds seemingly in excess of five million dollars annually, in violation of 48 CFR 31.3 parts B.3, C.2, C.3, C.4, E.2.d, G.1.a(3), and J.44. In sum, said doubling conclusively "broke" the Data Center's flawed indirect cost model, and non-disclosure would render its cost and pricing data pervasively defective, and even entirely disallowable and warranting double payback.

2. The Questions Arise As Narrow Matters Of Law, Because Petitioner Accepts The Findings Of Fact.

The trial court's judgment was entered pursuant to a motion brought by respondents under California Code of Civil Procedure, section 664.6, which provides:

> If parties to pending litigation stipulate...orally before the court for settlement of the case..., the

court, upon motion, may enter judgment pursuant to the terms of the settlement.

Such terms were put on record December 11, 1998. The court granted the motion to enter judgment on March 26, 1999, pursuant to the oral findings set forth at p.30, which petitioner herein accepts, as follows.

This petition challenges only the appellate affirmance of the settlement-enforcing judgment,[2] and it does so assuming, *arguendo*, the veracity of all findings as to the settlement terms, including that petitioner knowingly agreed:

(1) not to file prospective claims under the bounty hunter and whistleblower provisions of the FCA; and

(2) not to disclose the settlement sum to the federal government, unless compelled to by legal process.[3]

A favorable decision by this court would not only warrant remand for further consistent state proceedings, but would restore petitioner's rights to act under the FCA, to the extent they can be restored, given the lapse of time.

---

[2] Other parts of the decision -- e.g., the affirmance of the rule that petitioner has no work product privilege, because he is not an attorney -- incidentally note that petitioner's injury is mooted by the judgment. They can be reconsidered in the event of remand.

[3] None of the evidence cited by either party re any issue on appeal contained any contradictory historic facts. Re these disputed findings of, accepted herein, respondents and court referred only to the settlement terms put on record, as did the court of appeal.

Given the accepted settlement terms, the affirmance of the judgment rests on only the following two parts of the appellate decision. As follows, the first part affirms the concomitant sealing order, finding no interest that could have warranted a public hearing, in part based on the order being "narrowly tailored" to the settlement terms (p.48-49):

> Plaintiff concedes that the parties' contractual nondisclosure obligations were an overriding interest.[4] This interest obviously would have been prejudiced by disclosure. Sealing the terms of the settlement was clearly the least restrictive means available to ensure the confidentiality of the settlement terms, and the sealing was narrowly tailored so as to seal only the terms of the settlement. There is no indication anywhere in the record before us that anyone other than plaintiff ever expressed any interest in these proceedings and would have opposed sealing if only a noticed hearing had been provided. A noticed hearing and express findings would have produced the same sealing orders.

The second at bar part of the decision comprises the dispositive grounds on which the judgment is affirmed as not against public policy (p.52):

---

[4] Petitioner cited this as a *possibly* overriding interest, to be weighed against the public interest at a hearing.

> Plaintiff maintains that the judgment was invalid even if he validly agreed to its terms because he was entitled to subsequently rescind it "for illegality of consideration, and as against the public interest." The only "illegality" he mentions is his allegation that the judgment impaired his First Amendment right to freedom of speech and his alleged right to bring a federal action. First Amendment rights may be waived if the relinquishment is clear, knowing and compelling. (*Fallout v. Hampshire* (1999) 74 Cal.App.4th 1394, 1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398.) ... No "illegality" was involved in plaintiff's knowing and voluntary agreement to the nondisclosure obligation contained in the settlement. *Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the nondisclosure term of the settlement. Similarly, plaintiff's waiver of his federal claims was not illegal nor against the public interest.*

The italicized conclusions are the conclusions of law that give rise to the questions presented. They are expressly bounded by the record, and so petitioner sufficiently states the case by fully presenting that record, under point 4 below.

3. The Settlement Negotiations And Rescission.

The following resume of facts reproduces text from the Statement of Facts in the Opening Brief on appeal, but is

substantially edited, unlike the excerpts given under point 4. Without undermining his acceptance of the state court's findings, for purposes of completeness, petitioner first recounts the wholly uncontradicted historic facts as to the settlement negotiations and his rescission.[5]

On September 11, 1998, mediation blew up at the last, because, in the standard release he was given to sign, he refused to accept restrictions as to federal claims and communications with federal agencies, specifically:

> [Plaintiff releases] any Claims under any...federal statute.
>
> [Plaintiff will not] abet, encourage, suggest, promote, commence, prosecute, or cause to be commenced, prosecuted, either by himself or in cooperation with any...governmental agency, any claim...before any... federal court.

Petitioner objected that these terms were improper, in light of Stanford's refusal to admit error.

By letter dated September 13, 1998, petitioner proposed the following compromise:

---

[5] In reaching the accepted findings, respondents and court dismissed all these facts as inadmissible showings of "undisclosed intentions" -- undisclosed, that is, in the transcribed settlement terms, which they entirely relied on to support said findings. This is confirmed on the face of the court of appeal's decision.

> A gentleman's agreement would seem possible, in which I would give my word of honor as to non-disclosure, even to federal agencies by qui tam action or otherwise. Such a gentlemen's agreement would require changes of sufficient substance to cause me to believe the federal disclosure unwarranted, comprising credible admissions of mistake instead of the vague expressions of regret...accompanied by withdrawal of the absolute prohibition against future membership of the Stanford family.[6]

The offer was made through the mediator. In reply, respondents somehow persuaded the mediator to try and insist that petitioner was illegally holding on to his copy of the settlement draft.

On October 9, 1998, the Hon. Jacobs-May, Judge, initiated a judicially supervised settlement conference to resolve this impasse. To this end, the parties made joint and ex parte presentations at an October 19, 1998 conference. The conference was ultimately continued to December 11, 1998. On that day, the parties were surprised by the substitution of the Hon. Richard C. Turrone, judge. The conference comprised an ex parte session with respondents,

---

[6] The last clause traded appellant's right to file an FCA action to set aside the retaliatory rehire bar that he would otherwise unconditionally accept so as to settle the state action. The court refused to resolve the specific controversy as to the release of this action. ("I'm not going to pass judgment on it." -- p.30.)

which lasted over thirty minutes, about a five minute ex parte session with appellant, before a brief joint session in which the agreed language was rehearsed, before being put on record.

In petitioner's ex parte session, the court asked whether he would accept the same terms, except that the restrictions as to FCA claims and communications with federal agencies would be dropped. Petitioner agreed, but began to explain his intentions re a federal suit, in light of the lack of an admission of error, inter alia. The court cut this short, advising him not to mention the federal issues because, being dropped, they were beyond the scope of the terms. As a result, federal claims were never mentioned with both parties present. The draft release was read into the record, the references to federal claims and federal agencies being deliberately skipped.

The settlement terms would not execute until the new year. Uneasy as to not having informed respondents of his intentions at the conference, by a December 29, 1998 letter, petitioner gave notice that he was preparing to file suit under the FCA, reciting that "by dropping its deal-breaking insistence on references to federal claims, Defendant decisively allowed" any such FCA action. By a January 11, 1999 letter attached to their settlement check, respondents replied that "under the terms of the December 11, settlement, you released your right to bring any such claim." Petitioner returned the check with a January 12, 1999 letter rescinding the settlement as void, owing to the misunderstanding. Since then, he has received nothing.

4. The Excerpted Record On Which Stands The Decision Of The Court Of Appeal.

Emphases and footnotes are in the original; [] indicates an abbreviating redaction and/or a continuity edit; [RC] replaces citation(s) to the record; [ref] indicates a reference to another page in the pleading. Occasionally, a reference is replaced by the text that is referenced.

A. Opening Brief, Statement of Facts: Re FCA Claims.

The *only* fought-over settlement terms are purported restrictions on claims arising from the violations of the FCA (10 U.S.C. §§ 2306a, 2324(c)(3)(A); 48 C.F.R. Ch. 1 § 31.3) particularly alleged in paragraphs 37-42 of the [disallowed] proposed complaint. [RC] "[U]nauthorized redistributions" include "both a disallowed seven-figure lump sum, and an ongoing diversion of funds seemingly in excess of five million dollars annually, [] subject to double payback." [RC] Also alleged are the misreporting of employee functions, and repudiations of extraordinarily mandated accounting priorities and policies.[7]

---

7 The FCA violations are not sued on per se [which federal law would presumably preempt], nor is their rigorous proof required, although an exemplary award should consider their face value. They are properly bold facts the mere arguability of which shows federal jurisdiction over each of said seven simple statements of business fact [ref], each of which allegedly violates the False Statements Act (18 U.S.C. § 1001), and thus the implied-in-fact contract. This design reduces trial to a list disputed *surface* business facts, of which appellant has direct knowledge and

A cover-up of these violations allegedly motivated the pretextual termination and right to sue impairments that define the surviving claims; the loss of the public policy tort is by definition a right to sue impairment damage in the fraud claim; and such violations would surely bear on exemplary damages. Even so, stated as requests for admission they were held irrelevant beyond discovery, by order filed December 8, 1998.[8]

[] By letter dated December 29, 1998 [RC], appellant stated his intention to file an FCA suit, including a particular "retaliatory" claim (per 31 U.S.C. § 3730 (*h*); [RC]), and his understanding that "by dropping its deal-breaking insistence on references to federal claims, Defendant decisively

---

documentary proof. See, e.g., [RC]. [] Appellant's model was *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418.

[8] RFAs No. 5-11; [RC]. The first in the set (RFA No. 5) was fundamental. It sought an admission:

> That, from 1987 through 1992, federal claims totaling millions of dollars per year were negotiated to pay for computer usage charged out by the Stanford Data Center.

This was denied as "insufficiently relevant," although, with all references to public funding and the FCA excised, the court did compel discovery re the computer usage and the *internal* budget for it. [RC]. A like excision of references to regulatory controls was effected re RFA No. 9. [RC]. The remaining requests, which merely asked that respondents admit federal jurisdiction over said statements of business fact, were denied as soliciting "a legal conclusion." [RC].

allowed" any such FCA action. [RC]. By a January 11, 1999 letter attached to their settlement check, respondents replied that "under the terms of the December 11, settlement, you released your right to bring any such claim." [RC] Appellant returned the check, with a January 12, 1999 letter rescinding the settlement as void, owing to the misunderstanding. [RC]

B. Opening Brief, Point 5: "The Judgment Is Against Public Policy Because It Impairs The Capacities Of The United States And Appellant To Utilize The FCA, [And] Invades Appellant's First Amendment Rights Re A Matter Of Public Concern."

The judgment gravely impairs Appellant['s] rights of speech and action re the known FCA claims, waivable or not. As a matter of record, without the reinstated FCA release, appellant would early this year have initiated the FCA suit that he started preparing after the purported settlement, whereas he is instead exhausting his state remedies to annul the FCA reinstatement, *while his six-year limitation on the most substantial qui tam federal claims runs out.* The court was informed ~~of~~ this contingency when it made the FCA findings. [ref]

[]In his December 29, 1998 [rescission] letter to respondents, [appellant wrote] [RC]:

> I should never have been expected to surrender the principle of complete communication that cost me my job over six years ago, on account of which I issued the still-suppressed April 9,

> 1992 memorandum to Defendant's Board of Trustees.

That most prized [RC], that doggedly defended, that smallest but spirit-saving residue of freedom, merely to mail documents to improbably interested federal agents; even that is taken and twisted by a finding of sellout, backed up by a disclaimer as to trial of fact,[9] and the victor's rule-setting sanctions-seeking follow through[, as follows].

On July 9, 1999, [post-facto] opposition to the motion for new trial was filed [RC], comprising: **(a)** mostly verbatim copy of filings in the section 664.6 motion...[RC]; **(b)** a request for sanctions (costs of $2,350); and **(c)** a half-page response to the public policy attack on the confidentiality provision. Without citing authority, respondents made their position plain [RC]:

> In the unlikely event the federal government needs to discover the terms of the agreement between Plaintiff and Stanford, then the federal government can presumably compel Plaintiff to disclose that information.

As for pursuing an FCA suit, just in case waiver *is* possible, appellant must now exhaust state remedies to set

---

9 This refers to the summary denial of the motion for new trial, even before opposition was filed, imputing that the judgment involved no "trial of fact." P.36. The court of appeal assumed there had been a trial so as to affirm the order (pp.53-54), but *both* parties read it as grounded on there having been no trial of fact.

aside the finding of waiver. He is not even free to pursue an FCA suit based on his honest opinion as to waivability, even if correct, for he faces yet another attack for reneging on a promise, with inevitable frustration, risk, and skepticism to surmount. Moreover, a relator's action *must* commence with *voluntary* service on the government of "substantially all the material evidence and information the person possesses." 31 U.S.C. § 3730 (b)(2) [RC]. A related settlement sum is a most material fact.[10]

Uncertainty as to the imposition of a penalty is certainly not the salve the court seemed sold on, when it adopted the hypothetical non-waivability tautology as its on-the-merits mantra. It is basic that "[j]udicial construction must not create uncertainty inhibiting exercise of a constitutional right. [Citation.]" *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 519, and that official edicts that penalize expressive conduct must define

---

[10] In *U.S. ex Rel. Killingsworth v. Northop Corp.* (1994) 25 F.3d 715, the United States declined to intervene in an FCA suit brought by a relator with a common law wrongful termination claim. *Killingsworth* settled the FCA claim for $1 million, and his wrongful termination claim for $3.2 million. The United States objected that the proportion allocated to the FCA claim was too low. Even after *Killingsworth* shifted $500,000 to the FCA sum, the United States filed to block the deal. *Held*: the United States had an interest in the related settlement sum, and the right to a hearing on charges of disproportionate allocation. See also *U.S. ex rel. McCoy. supra* (entire FCA settlement proceedings presumably public).

the conduct with narrowness and certainty. *Reno v. American Civil Liberties Union* (1997) 117 S.Ct. 2329, 2344-2346. Nor may free speech rights be invidiously closed to those "who do not have a full purse." *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 112. The uncertainty of the judgment thus imposes an unconstitutionally chilling risk, by virtue of the confidentiality provision.

After the motion for new trial was denied, *California Teachers Assn. v. State Of California* (1999) 20 Cal.4th 327, at 335-346 confirmed that:

> [Penalty in event of adverse outcome] impermissibly chills the right to a hearing in every case in which [party] cannot know the ultimate outcome – in other words, in every case – even if [party] does demand and obtain a hearing. A litigant's non-frivolous assertion of a procedural right may not be chilled through fear of subsequent reprisals in the form of monetary penalties... more severe than that typically imposed on defeated parties. [Citation.]

More recently, *Linsley v. Twentieth Century Fox Films Corp.* (1999) 75 Cal. App. 4th 762, made it alarmingly clear that after paying the substantial penalty that utilizing the FCA now immediately draws, appellant risks a punitive attorney fee award, should the FCA claim be found waivable.[]

[As for confidentiality,] Appellant's opposition to entry of judgment included ([RC] orig. emphasis):

> The entire substance of litigation implicating federal regulation is very strongly presumptively public, *especially* where parties prefer confidentiality. ([Citation] "[D]isclosure of poor management in the past...is hardly a trade secret. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.") In particular, settlement proceedings in a 31 U.S.C. § 3730 action are presumptively public, to guard against "sweetheart" deals between a Defendant and *either* a relator *or* the government. *U.S. ex rel. McCoy v. California Medical Review* (1990) 133 F.R.D. 143.

Appellant developed this into a First Amendment public access issue in the motion for new trial, attacking the uncertainty of the judgment as follows [RC]:

> This "possible release" finding renders the expressly material confidentiality provision, which heavily penalizes communication of the settlement sum "unless compelled by legal process to do so," and which seals the judgment:
>
> **(a)** against public policy, in that it impairs the capacities of the United States and/or Plaintiff to utilize the provisions of 31 U.S.C. § 3730 (*U.S. ex Rel. Killingsworth v. Northop Corp.*

(1994) 25 F.3d 715; *U.S. ex Rel. DeCarlo v. Kiewit.* (1996) 937 F.Supp. 1039);

(b) an unconstitutional restraint on plaintiff's rights to speak freely under U.S. Const., Amnd. 1 ... (*Organization For A Better Austin v. Keefe* (1971) 402 U.S. 415...); and

(c) an unconstitutional restraint on the freedoms of the press under U.S. Const., Amnd. ... (*Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469; ...).

Since then, the First Amendment right of access to civil filings has been upheld under both federal and state law. *San Jose Mercury News v. U.S. Dist. Court* (9th cir., 1999) 187 F.3d 1096, 1101 held that the "right of access to court documents belongs to the public, and Plaintiffs were in no position to bargain that away."[]

C. Opposition Brief: The FCA Issue Was From The Outset Mooted By Limitations; Unwaivable Claims Are Not Waived.

This court need not address these arguments because they are moot. Johnson's purported FCA claims are time-barred. [His] allegations describe events occurring between 1984 and 1992. [RC] The statute of limitations for FCA claims is governed by 31 U.S.C. section 3731(b), which provides that a civil action under section 3730 may not be brought more than six years after the date on which the violation of section 3729 is committed or more than three

years after the date when the facts material to the right of action are known or reasonably should have been known, which ever occurs last. As Johnson alleges no misconduct relevant to the FCA occurring later than 1992, this six year statute expired sometime during 1998 at the very latest. Any such claims are clearly barred now, and, in fact were probably barred at the time Johnson advised the court of his interest in filing an FCA claim in October of 1998.

Accordingly, Johnson's arguments, that the settlement agreement must be struck down as impermissibly barring his right to file an action under the FCA or as interfering with his rights to discuss a claim under that act, should be ignored as completely frivolous for the reason that they expired years ago.[]

Johnson considers the settlement agreement's release of "any and all claims" to be the alleged "offense to public policy" because of his purported interest in later filing a claim under the FCA. As discussed above, this question is moot. Aside from that, as the trial court clearly indicated at the hearing on the entry order, "If there are claims that one cannot waive as a matter of public policy, then they haven't been waived... If the qui tam or some other unwaivable claim is out there , then it can be pursued." [RC] If Johnson is correct in his oft-repeated assertion that a qui tam claim under the FCA cannot be released, then it was not released by the settlement agreement, and there is no violation of public policy.

D. Reply Brief: "Respondents Conceal Their Expectation That FCA Limitations Would Expire In 2000"

In the January 11, 1999 letter attached to the settlement check [RC], Respondents volunteered, that, re an FCA claim:

> [T]he applicable statute of limitations has long since run...the whole issue of billings was the subject of an exhaustive review which was resolved with the government in 1994.

As shown at [ref], Respondents were thereafter informed that an applicable statute of limitations was six years, per 31 U.S.C. section 3731 (b)(1).

Respondents' brief conceals their publication of 1994 as the logical date from which FCA limitations run. Without citing a single case, they now affirm only that the statute runs from the date of the events that occurred in the course of appellant's 1992 termination (effective August 7, 1992), alleged at [RC], which they equate to all FCA violations on which appellant can sue. But the 1992 events comprise *internal* misrepresentations, stated as FSA (18 U.S.C. section 1001) violations, in that they *project* FCA non-disclosures. FCA suits to *recover* money can hardly accrue before government dealings are done.[11]

---

[11] *TS Infosystems, Inc. v. U.S.* (1996) 36 Fed.Cl. 570, 572-573 very differently reviews conflicts in the federal courts as to whether the statute runs from the necessarily post-fiscal-year *submission,* or from the later *settlement* of a claim, and as to

E. Petition For Rehearing: "Legality Of Judgment"

At [RC], the court tersely dismissed appellant's rescission of the settlement as illegal, by holding the confidentiality of its terms "narrowly tailored," and the judgment not against public policy, as follows:

> Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the non-disclosure of the settlement. Similarly, plaintiff's waiver of *his* federal claims was not illegal nor against the public interest.

In the FCA context, "*his* federal" has the transcendental uncertainty of an emphatic oxymoron. What *does* it mean? By exacerbating the uncertainty, the opinion compounds the offense to public policy.[] The opinion fails to recognize that appellant now risks punitive sanctions by filing a FCA suit. In addition, under the enforced terms, any such filing is arguably a material breach, nullifying the entire settlement.

This court omitted the FCA particulars ...

At [CR], plaintiff explained the public interest against nondisclosure: "[A] relator's action *must* commence with *voluntary* service on the government of "substantially all the material evidence and information the person possesses." 31 U.S.C. § 3730 (b)(2) [RC]. [footnote] "Substantially all" necessarily includes the settlement sum, as the footnote elaborated, wherefore the settlement terms on their face preclude compliance with the statutory language.

---

whether delayed accrual, equitable tolling, and ongoing violation doctrines may extend it.

The uncontradicted record manifests that the judgment, as a matter of fact, deterred the filing of multimillion dollar FCA suit, beyond the probable pale of its statute of limitations. At [CR], petitioner noted that it is at best unclear as to "whether delayed accrual, equitable tolling, and ongoing violation doctrines may extend" this limit.

On this point, this court omits appellant's authority *U.S. ex rel. Green v. Northrop Corp.* (1995) 59 F.3d 953, cited at [CR]. To this, he adds: *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303 ("*absolute* privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing"; emphasis added); and Labor Code § 1102.5, which prohibits employer retaliation against an ex-employee who reports a reasonably suspected violation of the law to an enforcement agency.[12]

Another authority shows that the settlement terms are within the compass of these authorities, namely, *Cariveau v. Halferty* (2000) 83 Cal.App.4th 128. In a letter to the court dated September 4, 2000, appellant wrote as follows:

---

12 "No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or violation or noncompliance with a state or federal regulation [or] retaliate against an employee for disclosing [such] information." This is inclusively construed, and applies to ex-employees.

> In the settlement of a suit involving undisclosed regulatory shortfalls, *Cariveau* held that a confidentiality clause was against public policy insofar as it barred voluntary communications to regulators, and that the imposition of such "a restrictive confidentiality clause... is an instance of misconduct in itself." *Id.* [137].

[In retrospect, the court of appeal's "narrowly tailored" standard distinguishes *Cariveau*, wherein the confidentiality clause was global, and encompassed discovery, as in the settlement that petitioner rejected September 11, 1998. The judgment limits confidentiality to the settlement terms.]

F. Opposition To Rehearing

[After repeating their prior points of law, respondents for the first time addressed one of petitioner's federal cases, avoiding one of his prefiling FCA settlement cases:]

The cases appellant cites in support of this argument do not help him. For example, *US. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir., 1994) involved an FCA action which the plaintiff litigated and then settled for a sum later questioned by the United States as too low - not the barring of the filing of the FCA claim in the first place by virtue of a settlement agreement. Several other [state] authorities cited by appellant work against his argument. [] All of these authorities support, in one way or another, the reassurance provided to appellant by the trial court and affirmed by this court - if the claims you have in mind cannot be waived as a matter of law, then they have not been waived

by this agreement. There is no "illegality" here, and no offense to public policy.

G. Questions Presented To The Supreme Court

[Petitioner summarized his above arguments, in presenting the following two questions:]

Is a 664.6 judgment against public policy if pursuant to a finding that known claims under the federal False Claims Act are waived, except for those that are unwaivable?

Is a 664.6 judgment against public policy if it enforces the secrecy of *any* information of possibly substantial interest to a federal regulatory agency? If not, is such enforced secrecy against public policy where "substantially all" such information must be disclosed as a prerequisite to filing known FCA claims?

REASONS FOR GRANTING THE WRIT

1. The Questions Are Simply And Surely Raised

Especially in light of his pro per status, petitioner deemed it essential to establish that the questions presented are clearly supported by the record, beyond surprise. This he accomplished above, by showing essentially the entire record that gives rise to the questions. On these issues, what you see is what you get. And, as explained above, by virtue of his accepting the court's findings of fact, what you get are the two questions presented, simply and surely raised.

2. Whether Courts Can Enforce Terms That Deter *Any* Communication Of Possible Interest To Regulatory Agencies Is An Unsettled Question Of Importance, Which The State Has Decided Contrary To Applicable Federal Law.

(In the following, to help persuade this court that the questions herein qualify for and merit its attention, petitioner incidentally quotes two legal newspaper reports in good faith, mindful that this is not a brief on the merits.)

Settlements, being contracts, are generally matters of state law. But when they involve waivers of federal constitutional or statutory rights, federal law prevails. Mindful of the high percentage of cases that settle; of the last decade's vigorous lobbying against "sunshine" laws by corporations that can generally insist on secrecy in settling with injured individuals; and of the accelerating growth in case volumes; how many federal cases would one expect to contain the text "confidential (or secret) settlement"? The fingers on one hand can count the numbers per district (or per state), and they can count all cases that address the legitimacy of these nondisclosure pacts.

Only one Supreme Court case comes up, *Digital Equipment Corp. v. Desktop Direct* (1994) 511 U.S. 863, 878-880. It decisively holds that the "public policy favoring the voluntary resolution of disputes" is clearly outweighed by "rights originating in the Constitution or statutes," and it disparages the "suggest[ion] that [a statute-based immunity] public policy may be trumped routinely by the expectations or drafting of clever parties." The state court's "unwaived if

unwaivable" addendum to the settlement terms is such a drafting, but it is encompassed by the "operates to deter" language in the questions presented.

The confidentiality question also cuts through linguistic devices by overarching simplicity. The state court found the secrecy "narrowly tailored" enough, which distinguishes *Cariveau, supra.* But do tailoring and balancing tests even apply? Can a settling litigant have *any* legitimate interest in silencing *any* report of potential illegality?

This state evidently takes for granted the legality of secret settlements in cases where people are seriously injured or killed because of product defect or environmental hazard.[13] But the law of the state would seem already to hold such settlement secrecy void, albeit by the lone authority *Cariveau, supra.* How then, can such an enactment be so contentiously fought over -- and lose badly? Is public policy trumped routinely by unabashed expectations?

---

13 "California's trial lawyers were dealt a crushing defeat Friday when they had worked feverishly to pass was left to die in the Assembly without so much as a vote. From day one of the session, it was clear that the Consumer Attorney of California was betting everything it had on the passage of SB-11. The bill by Sen. Martha Escutia D-Montebello would have banned secret settlements in cases where people were seriously injured or killed because of product defect or environmental hazard....An identical bill out of the Assembly -- AB 36 -- was also left treading water." *The Recorder* (San Francisco), Sept. 18, 2001

Until it learned of the settlements from a reluctant employee, EEOC found the well below normal contact rate "sinister." Just so, the paucity of secret settlement case law simply shows how well they work. As a matter of fact, their volume has overwhelmed the trial court herein.[14]

3. Whether Courts Can Enforce Terms That Generally Deter The Filing Of FCA Claims, Without The Government Being Informed, Is An Unsettled Question Of Importance, Which The State Has Decided Counter To Applicable Federal Law.

Green, supra (p.24), held that settlors of state suits could not validly waive prospective "bounty hunter" FCA claims. In contrast, *Nguyen v. City of Cleveland* (2000) 121 F.Supp.2d 643 held that state courts have full jurisdiction to decide "whistleblower" FCA claims.[15]

---

[14] "Court administrators ...closed access [to case histories] after computer upgrades turned up inaccurate and confidential information. The upgrades won't be completed for another ten months, and, even then, administrators can't promise access will be restored...Turrone, the P.J., said balancing access and confidentiality issues can be challenging." *The Recorder* (San Francisco), Sept. 19, 2001.

[15] Petitioner respectively refers to 31 U.S.C. § 3730 (b) and (h) as "bounty hunter" and "whistleblower" provisions. Paragraph (b) provides for the recovery of money owed to the government, which the relator shares. Paragraph (h) *directly* makes only the whistleblower whole. However, it too was enacted to benefit public coffers, by its deterrent and enforcement effects.

In *U.S. ex rel. Hall v. Telydyne Wah Chang Albany* (1997) 104 F.3d 230, 233 the *Green* court held that where, "in contrast to Green, the government had full knowledge of the plaintiff's charges and had investigated them before" the parties settled, state settlors *can* validly waive prospective "bounty hunter" FCA claims. In so ruling, the court expressed uncertainty as to whether it should overrule *Green* in light of *United States v. Mezzanato* (1995) 513 U.S. 196, 201-202, where this court held that, "absent clear Congressional intent, courts should presume that statutory provisions may be waived by voluntary agreements.

Petitioner distinguishes *Mezzanato* by the fact that the statute therein provided a wholly private benefit, whereas a decisive test in *Green* and *Hall* was (emphasis added) that the "public interest in the use of the qui tam suits to supplement federal enforcement of the FCA *is not disturbed.*" The state court's express finding of no public interest, because unwaivable claims are not waived, *disturbs* the same interest, because the uncertainty deters qui tam filings. The risk of breaching the terms by filing suit is plain per se, and plainly exacerbated by their less than universal unwaivability. This court should settle the issue.

CONCLUSION

For the foregoing reasons, Petitioner prays that this court issue a writ of certiorari to review the April 20, 2001 decision of the state of California Court of Appeals, Sixth Appellate District. His wish list includes counsel to represent him in the event of a hearing.

Respectfully submitted,

_____ Date _____

Clifford Johnson,
Petitioner pro se.

APPENDIX 1: ORAL ORDER GRANTING JUDGMENT

SUPERIOR COURT, STATE OF CALIFORNIA
SANTA CLARA COUNTY

No.: CV 742286

Transcript of Court's Statement Of Decision At March 26, 2001 Hearing, granting Defendants motion to enter judgment

I think the material terms of the agreement are not in dispute. Plaintiff agreed to dismiss the case and vacate any and all pending motions, and agreed to provide the release of the claims that he had asserted, and those that were unasserted, that are known or unknown.

And I think that the undisclosed intentions of a party would not be relevant; the parties both manifested an intent to settle the dispute. If there are claims that one cannot waive as a matter of public policy, then they haven't been waived. And that would not, in any way, void the settlement in its entirety. There's a strong public policy favoring settlements. The case is settled. If the qui tam or some other unwaivable claim is out there, then it can be pursued. I'm not going to pass judgment on it.

But I think the motion is well made, the settlement is valid, judgment should be entered in accordance with the terms of the settlement per C.C.P. 664.6, and the Defendant is directed to prepare an appropriate judgment.

APPENDIX 2: CONFIDENTIAL JUDGMENT (REDACTED)

FILED April 20, 1999

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

No. CV742286

CONFIDENTIAL JUDGMENT

Dept. : 16; Honorable Richard C. Turrone

CLIFFORD JOHNSON, Plaintiff,

v.

The Board of Trustees of the Leland Stanford Junior University, Defendant.

This Court, having on March 26, 1999 granted defendant Stanford University's motion for entry of judgment pursuant to terms of settlement (brought by defendant pursuant to Code of Civil Procedure section 664.6), and having ordered entry of judgment as requested in that motion;

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that judgment in this matter be entered pursuant to the terms of the December 11, 1998 confidential settlement agreement between plaintiff Clifford Johnson ("Johnson") and Defendant Board of Trustees of the Leland Stanford Junior University and each of its departments, schools, related entities, employers, attorneys, predecessors, successors, faculty members or agents of any kind ("Stanford") as follows:

Johnson hereby releases any and all claims,whether asserted or unasserted, known or unknown, which he now or ever has had against Stanford. Johnson further waives the benefits of Section 1542 of the California Civil Code, which states

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of execution of the release, which if known by him must have materially affected his settlement with the debtor.

Stanford agrees to pay Johnson [REDACTED] upon entry of this judgment. Stanford will issue to Johnson a Form 1099 in that amount. Should any governmental agency

determine that any portion of the amount paid to Johnson under this judgment or the underlying settlement is subject to withholding as wages or other compensation, Johnson will indemnify and hold Stanford harmless for any amount that is determined that should have been withheld and paid over to the agency or entity.

Stanford agrees [REDACTED]

Stanford admits no wrongdoing in this action.

Johnson agrees that he will not at any time in the future seek or accept employment with Stanford. However, if Johnson's employer sends Johnson to work on subcontract to Stanford, that would not be deemed to be a violation of this judgment. Johnson agrees that he will not attempt or solicit such assignments, but that if he is assigned by his employer to work at Stanford, then he will not, by the action of his employer, be deemed to have violated the terms of this judgment.

Johnson acknowledges that he has not and that he will not disclose the terms of this judgment unless compelled by legal process to do so, or to the extent necessary to obtain financial advice from a professional advisor or accountant, if any. If asked about the status of the lawsuit, Johnson can say, "It was resolved to the mutual satisfaction of the parties," or "There was a mutually satisfactory settlement. I'm not a liberty to say anything else," but that is all.

Because protecting the confidentiality of the judgment is a material part of the settlement underlying this judgment, a breach of this confidentiality provision will be subject to and will require Johnson to pay Stanford [REDACTED]

Any disputes in the future between the parties arising out of or relating in any way to the settlement underlying this judgment or this judgment will be subject to final and binding arbitration under the rules set forth by the American Arbitration Association.

Each party is to bear its own costs and attorneys' fees.

Hon. Richard C. Turrone, Judge April 20, 1999

APPENDIX 3: ORDER DENYING NEW TRIAL

FILED May 24, 1999

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

No. CV742286

ORDER DENYING MOTION FOR NEW TRIAL

A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee (CCP section 656). Upon Motion by Defendant per CCP section 664.6 the Court entered judgment pursuant to the terms of a judicially supervised settlement. The Motion For New Trial is denied.

Hon. Richard C. Turrone, Judge May 24, 1999

APPENDIX 4: COURT OF APPEAL DECISION

FILED April 20, 2001

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
STANFORD UNIVERSITY, et al., Defendants and Respondents.

Judgment was entered pursuant to Code of Civil Procedure section 664.6. Plaintiff appeals. He claims that (1) the court erred in issuing a discovery order which required him to produce his "work product," (2) the court erred in making a "sanctions finding" against him, (3) the court erred by issuing "sealing" orders, (4) the court erred in entering judgment based on Code of Civil Procedure section 664.6 and (5) the court erred in denying his new trial motion. We affirm.

Background

The lawsuit at issue here is an action initiated by plaintiff in 1994 against defendants for wrongful tem1inatjon and related causes of action. Originally, defendants' summary judgment motion was granted on the ground that plaintiff had waived his right to bring a civil action by submitting his claims to "final and binding" arbitration. Plaintiff appealed, and this court reversed because there were triable issues of material fact underlying defendants' waiver defense.

After remand, plaintiff filed a second amended complaint containing seven contract and tort causes of action for wrongful teffi1ination, defamation and fraud. Defendants' demurrer was sustained without leave to amend as to all of the causes of action except that the demurrer was sustained with leave to amend as to a fraud cause of action. Plaintiff subsequently filed a third amended complaint containing nine causes of action. One of these causes of action had previously been the subject of a sustained demurrer without leave to amend. Defendants demurred to seven of the causes of action. They did not demur to two contract causes of action. The court sustained the demurrer without leave to amend as to five of the causes of action. The demurrer was overruled as to a fraud cause of action. The court overruled the demurrer as to one defendant on a trade libel cause of action and sustained the demurrer with leave to amend as to two other

defendants on that cause of action. Plaintiff s motion for reconsideration of this ruling was denied.

Defendants thereafter demurred again to the trade libel cause of action. The court sustained the demurrer with leave to amend. Plaintiff thereafter filed a fourth amended complaint containing but two causes of action: one for wrongful termination in breach of contract and the other for fraud. Defendants again demurred. They also sought sanctions under Code of Civil Procedure section 128.5 on the ground that plaintiffs fourth amended complaint violated the court's prior rulings on the demurrers. The court elected to treat the demurrer as a motion to strike, and it struck the fourth amended complaint as exceeding the scope of the court's prior ruling on the demurrer. It denied defendants' request for sanctions.

Hence, the operative pleading at that point was the third amended complaint containing two contract causes of action and one fraud cause of action. Defendants answered this complaint by admitting some allegations, denying others and raising numerous affirmative defenses. Plaintiffs subsequent motion for leave to file the fourth amended complaint was denied.

By October 1, 1998, the parties had undergone an unsuccessful mediation session that had lasted a full day. The court set a trial date of February 22, 1999. By stipulation of

the parties, the court subsequently continued the trial date to pern1it the court time to try to settle the matter. On November 16, 1998, defendants brought a motion to compel responses to their document production requests. Plaintiff, who had never been represented by an attorney in these proceedings, had refused to provide the documents on the ground that these documents were protected "attorney work product." In the morning on December 11, 1998, the court ruled that "you [plaintiff] do not have a work product privilege" and granted defendants' motion to compel.

Late in the afternoon on December 11,1998, the parties recited a settlement agreement on the record before the court. First, defendants' trial counsel stated the tern1s of the agreement.[16] These terms included, among other things, the following. "Plaintiff, Mr. Johnson, hereby releases any and all claims whether asserted or unasserted, known or unknown which he now or ever has had against the releasees. [¶] Mr. Johnson further waives the benefits of Section 1542 of the California Civil Code [thereby releasing even unknown claims] in exchange for this release." "Mr. Johnson acknowledges that he has not and agrees that he will not

---

[16] A transcript containing most of the terms of the settlement agreement is included in the unsealed appellant's appendix which constitutes the record before us. This transcript does not contain some of the confidential terms, apparently including the sum of money paid by defendants to plaintiff.

disclose the existence or terms of this settlement unless compelled by legal process to do so. . . ." "[H]e's going to agree to dismiss the case and the Court would vacate any and all pending motions." Discovery would "all come to a stop." The lawsuit would be dismissed with prejudice within three days after receipt of the agreed payment.

After the full terms of the agreement were recited on the record (in part by defendants' trial counsel and in part by the judge), the court asked plaintiff "Mr. Johnson, does that fully state your understanding?" Plaintiff responded "Yes. [¶] There is one verbal nuance. In the confidentiality it was said that I would be – I would remain confidential as to the existence and terms of the agreement. The existence of a settlement cannot be --" The court interrupted and clarified that plaintiff would not violate the agreement by telling someone that there had been "a mutually satisfactory settlement" of the action. Plaintiff agreed to this term. This colloquy then occurred. "THE COURT: You heard the terms, Mr. Johnson. Do you understand them? [¶] MR. JOHNSON: Yes. [¶] THE COURT: Do you agree to be bound by them? [¶] MR. JOHNSON: Yes." Defendants also expressed their agreement to the terms of the settlement on the record. The court closed out the hearing by stating "[t]he Court will declare it a judicially supervised settlement [and] put a stamp of approval on it."

Less than three weeks later, plaintiff wrote a letter to defendants in which he asserted that a potential "qui tam action" against defendants was not foreclosed by the settlement.

On March 8, 1999, defendants applied for an order sealing the reporter's transcript of the confidential settlement. The stated ground for sealing the transcript was that the parties had agreed that the terms of the agreement would be confidential. A sealing order was necessary because defendants wished to attach a copy of the transcript under seal to their motion to enforce the settlement agreement. The court immediately issued an order sealing the transcript.

On March 11, 1999, defendants filed a motion for entry of judgment pursuant to the terms of the settlement under Code of Civil Procedure section 664.6. On March 11, 1999, at defendants' request, the court stayed all proceedings, including discovery, pending the court's decision on defendants, motion to enforce the settlement agreement. Plaintiff opposed defendants' motion for entry of judgment. He claimed that the settlement agreement did not preclude him from pursuing "federal claims" because the agreement did not specifically reference such claims. He also asserted that a "qui tam action" could not be foreclosed by the settlement agreement because such claims were unwaivable since the federal government was the real party in interest. Defendants pointed out that the fact that the agreement could not waive any claims that were unwaivable as a matter of public policy did not go to the validity of the agreement but only to its scope.

The court found that the material terms of the agreement were undisputed, and it agreed with defendants that the existence of unwaivable claims "would not, in any way, void the settlement in its entirety." The court ruled that the settlement was valid and ordered the entry of judgment pursuant to Code of Civil Procedure section 664.6. On April 20, 1999, the court entered a "Confidential Judgment" pursuant to the terms of the settlement agreement. As the settlement agreement provided that the terms of the settlement would be confidential, the court also entered an order sealing the judgment.

On May 10,1999, plaintiff filed a motion for a new trial. On May 24, 1999, the court denied the motion. On June 9, 1999, plaintiff filed a notice of appeal from the court's December 11, 1999 ruling granting defendants' motion to compel discovery of items that plaintiff had argued were protected by his "work product privilege." On June 22, 1999, plaintiff filed a notice of appeal from the Confidential Judgment which itemized challenges to numerous prior orders including the court's sealing orders and its denial of his new trial motion.

Discussion

I. Purported Appeal From Discovery Order

In what he claims is a separate appeal independent of his appeal from the judgment, plaintiff purports to challenge the court's discovery order rejecting his "work product privilege" claim.

It is "firmly established" that discovery orders are not appealable, but are reviewable on appeal from a final judgment. (*Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784,786.) Plaintiff suggests that his appeal is somehow not from "a discovery order" but instead from the court's "ruling that he has no work product privilege." This does not further his argument in the least. Plaintiffs post-hoc re characterization of the order does not change its nature and, regardless, would not make it appealable. (Code Civ. Proc., § 904.1.) The order plaintiff purports to appeal from both is and was a discovery order. Thus, it is readily apparent that plaintiffs purported appeal from this order must be dismissed.

There is no need for further discussion of this issue. The court's discovery order was in force for but a few hours on December 11, 1998 before all discovery was terminated by the settlement. Nothing in the record suggests that the order was enforced during its extremely brief life.

Plaintiff does not urge that an error in the court's discovery order could somehow merit reversal of the judgment. Instead, he seems to suggest that the court's discovery order ruling that he had no work product privilege might have some ancillary impact "in further proceedings." All that is before us is an appeal from the judgment. Any opinion we might express on the validity of the court's discovery ruling would be irrelevant to that judgment, and we lack the power to issue such an advisory opinion. (*People Ex Rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910,912; see also Bishop v. Merging Capital, Inc. (1996) 49 Cal.App.4th 1803,1808.)

II. Appeal From Judgment

Plaintiff challenges not just the judgment and the denial of his motion for a new trial but also purports to challenge the court's sealing orders and what he calls the court's "sanctions finding" under Code of Civil Procedure section 128.5.

A. Sanctions

Plaintiff purports to challenge the court order denying defendants' request that plaintiff be sanctioned. After plaintiff filed a fourth amended complaint, defendants demurred and sought sanctions under Code of Civil Procedure section 128.5 on the ground that plaintiffs filing violated the court's

prior rulings on the demurrer to the third amended complaint. The court elected to treat the demurrer as a motion to strike, and it struck the fourth amended complaint as exceeding the scope of the court's prior grant of leave to amend. It denied defendants' request for sanctions.

Plaintiff argues that this order contained a "finding of sanctionable conduct" which might somehow have some detrimental impact on him in the future. While a sanctions order may be reviewed on an appeal from a final judgment (Code Civ. Proc., • 904.1, subd. (b)), plaintiff has pointed to nothing in the record which supports his implicit contention that he is aggrieved by the court's denial of defendants' request that he be sanctioned.

"Any party aggrieved may appeal. . . ." (Code Civ. Proc., • 902.) "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. Appellant's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730,737, citations and quotation marks omitted; see also *Adams v. Woods* (1857) 8 Cal. 306,315.)

The court stated that plaintiff s conduct had violated its orders but was not deserving of sanctions. Its only order on this matter was a denial of defendants' request for

sanctions. The record before us does not contain any support for a conclusion that there is any immediate, pecuniary and substantial injurious consequence to plaintiff from the court's order denying sanctions or its statement that plaintiff had violated its orders. We cannot conceive of any future impact on plaintiff which is neither nominal nor remote. Plaintiff was not required to pay sanctions, and the court apparently was not convinced that he had acted with an improper motive. In addition, since plaintiffs conduct plainly violated the court's orders, the court's finding was not an abuse of discretion. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992,1001.)

B. Sealing Orders

Plaintiff challenges the court's orders sealing both the reporter's transcript of the confidential settlement's terms and the judgment incorporating those terms.

Plaintiff relies heavily on the California Supreme Court's July 1999 decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC*). The California Supreme Court held in NBC that civil proceedings are presumptively open and that two prerequisites must be satisfied before such proceedings are closed or sealed. First, "a trial court must provide notice to the public of the contemplated closure. . . . [A]dequate notice is provided by publicly docketing the motion [for closure or sealing] reasonably in advance of a determination thereon. . . . [¶] Second, before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a

hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, 20 Cal.4th 1178,1217-1218.) The court recognized that enforcement of a binding contractual confidentiality obligation was an "overriding interest" which would justify sealing. (*NBC* at p. 1222, fn. 46.)

Both of the trial court ' s sealing orders occurred before the California Supreme Court issued its decision in NBC. This may explain why the trial court did not comply with all of the procedural requirements set forth therein. Nevertheless, plaintiff cannot claim to be aggrieved by the court's sealing orders since he agreed, as part of the settlement agreement, that the settlement agreement would be confidential and that he would not disclose its terms to anyone.

Nor would a noticed hearing and express findings have failed to result in sealing orders. Plaintiff concedes that the parties' contractual nondisclosure obligations were an overriding interest. This interest obviously would have been prejudiced by disclosure. Sealing the terms of the settlement

was clearly the least restrictive means available to ensure the confidentiality of the settlement terms, and the sealing was narrowly tailored so as to seal only the terms of the settlement. There is no indication anywhere in the record before us that anyone other than plaintiff ever expressed any interest in these proceedings and would have opposed sealing if only a noticed hearing had been provided. A noticed hearing and express findings would have produced the same sealing orders.

C. The Judgment

"If parties to pending litigation stipulate. . . orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (Code Civ. Proc., § 664.6.) "When ruling on a section 664.6 motion, the court in effect acts as a trier of fact. [T]he trial court must determine whether the parties .entered into a valid and binding settlement of all or part of the case. In making this determination, trial judges, in the sound exercise of their discretion, may receive oral testimony or may determine the motion upon declarations alone. [¶] The proper standard of review, therefore, is whether the trial court's ruling was supported by substantial evidence." (*Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 565, citation, quotation marks and emphasis omitted.)

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to

settlement contracts. An essential element of any contract is 'consent.' The 'consent' must be 'mutual.' Consent is not mutual, unless the parties all agree upon the same thing in the same sense. [¶] The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. . . . The parties' outward manifestations must show that the parties all agreed upon the same thing in the same sense. If there is no evidence establishing a manifestation of assent to the same thing by both parties, then there is no mutual consent to contract and no contract formation." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793,810-811, citations and quotation marks omitted.)

Plaintiff first claims that the settlement "Does Not Meet Statutory Requirements" because the court did not have the parties "before the court" as required by the statute. Not so. The record unambiguously reflects that plaintiff and defendants' authorized representative were "before the court" when the settlement terms were placed on the record and the parties expressed their agreement to these terms. The court's implicit determination that the parties were "before the court" at that time is supported by substantial evidence.

Plaintiff argues that the court could not enter judgment on the settlement without implicitly finding both that he had waived any waivable federal claims and that he

could not have reasonably understood that federal claims were excluded from the settlement's terms. He urges that substantial evidence does not support these alleged implicit findings. Plaintiff misconceives the court's role. It was required to decide whether the parties had outwardly manifested their consent to the settlement terms. The record reflects that plaintiff expressly stated that he understood and agreed to the terms of the settlement that had been stated on the record before the court. One term was that plaintiff waived ***all*** claims against defendants. As the court noted, if a claim was not waivable, this settlement term would not result in waiver of that claim. Plaintiffs subjective understanding of whether or not he had given up his federal claims was irrelevant because he had outwardly manifested an intent to waive all claims. This outward manifestation amply supported the court's finding that the parties had agreed to the settlement terms.

Plaintiff contends that reversal is required because the court erroneously failed to credit his extrinsic evidence regarding his pre-settlement and post-settlement desire to avoid waiving any federal claims. This contention is apparently based on the court's failure to specifically mention plaintiffs extrinsic evidence and its statement that "the undisclosed intentions of a party would not be relevant." As we have already explained, the court properly found that the parties had outwardly manifested assent to the settlement terms. Plaintiffs subjective desire to avoid waiving federal claims was irrelevant. The court did not err in rejecting extrinsic evidence of plaintiffs unexpressed desires.

Plaintiff maintains that the judgment was invalid even if he validly agreed to its terms because he was entitled to subsequently rescind it "for illegality of consideration, and as against the public interest." The only "illegality" he mentions is his allegation that the judgment impaired his First Amendment right to freedom of speech and his alleged right to bring a federal action. First Amendment rights may be waived if the relinquishment is clear, knowing and compelling. (*Fallout v. Hampshire* (1999) 74 Cal.App.4th 1394, 1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398.) Here, the record clearly and compellingly reflects that plaintiff was aware of and understood the terms of the settlement agreement regarding his nondisclosure obligation. His colloquy with the court about a "verbal nuance" in the nondisclosure obligation demonstrates both his awareness and his understanding of that obligation. His unambiguous consent to the settlement established that he agreed to the nondisclosure obligation. No "illegality" was involved in plaintiff's knowing and voluntary agreement to the nondisclosure obligation contained in the settlement. Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the nondisclosure term of the settlement. Similarly, plaintiff's waiver of his federal claims was not illegal nor against the public interest.

The court's entry of judgment on the settlement agreement was supported by substantial evidence.

D. Denial of New Trial Motion

Plaintiff contests the court's denial of his motion for a new trial. Plaintiff claims that the court incorrectly concluded that a new trial motion was inappropriate because there had not been a trial. He also asserts error in the court's failure to reweigh the evidence under a "clear and convincing evidence" standard in response to his motion.

The court denied plaintiffs new trial motion in a minute order which read, in full: "A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court or referee (CCP section 656). Upon Motion by Defendant per CCP section 664.6 the Court entered Judgment pursuant to the terms of a judicially supervised settlement. The Motion For New Trial is denied."

Plaintiff concludes from this brief order that the court erroneously failed to consider the merits of his new trial motion. " A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Indulging all presumptions in favor of the validity of the court's order, we cannot concur in plaintiffs assumption that the trial court erred. The first sentence of the court's order is an accurate quotation of the text of Code of Civil Procedure section 656. The second sentence of the order is an accurate statement of the

procedure by which the judgment was obtained. The third sentence states that plaintiffs motion is denied. Nowhere in the order did the court state that it was refusing to consider the merits of the motion. Therefore, we must presume that the court applied the appropriate standards and denied the motion on its merits. As plaintiff raises no other challenge to the court's ruling on the motion which is independent of his challenges to the judgment itself, we can find no basis for disturbing the court's ruling on his new trial motion.

Conclusion

The judgment is affirmed. The purported appeal from the court's December 1998 discovery order is dismissed.

Mihara, J.

WE CONCUR: Premo, Acting P.J. Elia, J.

APPENDIX 5: DENIAL OF PETITION FOR REHEARING

FILED May 15, 2001

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
BOARD OF TRUSTEES, et al., Defendants and Respondents.

BY THE COURT:*

Appellant's petition for rehearing is denied.

Dated May 15, 2001 PREMO, J.

* Before Premo, Acting P.J., Elia, J. and Mihara, J.

APPENDIX 6: ORDER OF SUPREME COURT

FILED July 11, 2001

Court Of Appeal, Sixth Appellate District - No. H020137

IN THE SUPREME COURT OF CALIFORNIA
En Banc

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
STANFORD UNIVERSITY, et al., Defendants and Respondents.

Petition for review DENIED

Werdeger J., was absent and did not participate

GEORGE

Chief Justice

APPENDIX 7: INVOLVED FCA PROVISIONS

Section 3730. Civil actions for false claims.

(b) Actions by Private Persons. - (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

...

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall(A) proceed with the action, in which case the action shall be conducted by the Government; or(B) notify the court that it declines to take over the action,in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions. - (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion. (B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera....

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.

...

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy

available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

(d) Award to Qui Tam Plaintiff. - (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information(other than information provided by the person bringing the action)relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(e) Certain Actions Barred. - ... (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government

before filing an action under this section which is based on the information.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Section 3731. False claims procedure.

(b) A civil action under section 3730 may not be brought(1) more than 6 years after the date on which the violation of section 3729 is committed, or(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.